

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
TOWNSHIP OF VERNON, NEW JERSEY)	FCC File No. 0002644841
)	
For Authority to Operate a Conventional Public)	
Safety Radio System in the 470-512 MHz Band)	
and Associated Requests for Waiver of Sections)	
90.307(d), and 90.311(a)(2) of the Commission's)	
Rules)	

ORDER

Adopted: March 6, 2007

Released: March 7, 2006

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. We have before us an application and waiver requests filed by the Township of Vernon, New Jersey (Vernon).¹ First, Vernon requests a waiver of Section 90.307(d) of the Commission's rules² to operate a conventional public safety radio communications system³ short-spaced to television (TV) station WNEP-TV, Scranton, Pennsylvania.⁴ Second, Vernon requests a waiver of Section 90.311(a)(2) of the Commission's rules⁵ to use a frequency pair available only to eligible users in the Industrial/Business (I/B) category.⁶ Finally, we also consider Vernon's request to use a frequency pair that would require a waiver of Section 90.313(c) of the Commission's rules, but for which Vernon did not seek a waiver.⁷ For the reasons discussed herein, we conditionally grant Vernon's request for a waiver of Section 90.307(d); deny the request for a waiver of Section 90.311(a)(2); and deny the request to use the frequency pair subject to Section 90.313(c). We therefore grant Vernon's application, in part, and deny it, in part.

¹ FCC File No. 0002644841 (filed June 9, 2006, amended Dec. 12, 2006), and accompanying letter from Gary G. Gardner, Assistant Township Manager, Township of Vernon, to Federal Communications Commission, dated June 9, 2006 (Section 90.307(d) Waiver Letter), and letter from Gary G. Gardner, Assistant Township Manager, Township of Vernon, to Federal Communications Commission, dated June 9, 2006 (Section 90.311(a)(2) Waiver Letter).

² 47 C.F.R. § 90.307(d).

³ Vernon proposes to use frequency pairs 478/481.9625 and 477/480.0625 MHz at location 1, "MOUNTAIN TRL GE AMERICAN MICRO WAVE TWR," and frequency pairs 476/479.3250 and 477/480.0375 MHz at location 2, "LAKESIDE DRIVE." See FCC File No. 0002644841.

⁴ See Section 90.307(d) Waiver Letter.

⁵ 47 C.F.R. § 90.311(a)(2).

⁶ See Section 90.311(a)(2) Waiver Letter.

⁷ See 47 C.F.R. §90.313(c). A waiver of Section 90.313 would be necessary because one of the same frequency pairs sought by Vernon is short-spaced to a fully-loaded, operational station. See *infra* para. 9.

II. BACKGROUND

2. The 470-512 MHz band is allocated for land mobile radio use on a geographically shared basis with TV broadcast stations.⁸ Vernon is located within the New York/Northeast New Jersey urbanized area.⁹ Vernon currently is licensed for operation on two frequency pairs in the TV channel 15 (476-482 MHz) band, under call sign WQBZ928.¹⁰ On January 12, 2005, the Commission granted Vernon's request for a waiver of Section 90.307(d), which authorized Vernon to operate station WQBZ928 short-spaced to station WNEP-TV.¹¹ Vernon now seeks a new license to operate a public safety radio system on four frequency pairs in the TV channel 15 band, at two locations shared with station WQBZ928.¹² Vernon states that its frequency coordinator, the International Municipal Signal Association (IMSA), has determined that "there is no other alternative to this application."¹³

III. DISCUSSION

3. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest,¹⁴ or the applicant has no reasonable alternative.¹⁵ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹⁶

4. Section 90.307(d) requires that base stations with associated mobile units be located at least 145 kilometers (90 miles) from any protected adjacent channel TV station.¹⁷ The purpose of Section 90.307(d) is to protect adjacent channel TV stations from interference caused by mobile units operating in or near the TV station's coverage area.¹⁸ Vernon requests a waiver of Section 90.307(d) because its two proposed base stations would be located, respectively, only 114.97 kilometers (71.45 miles) and 112.79 kilometers (70.10 miles) from adjacent TV channel 16, station WNEP-TV.

5. We believe that granting a waiver of Section 90.307(d), as conditioned below, would not thwart the purpose of the rule for several reasons. First, after a review of the propagation study Vernon submitted with its application, we are persuaded that station WNEP-TV's 64 dBu Grade B contour would

⁸ See 47 C.F.R. § 90.301.

⁹ See 47 C.F.R. §§ 90.303(b), 90.305(a).

¹⁰ Station WQBZ928 operates on frequency pair 478/481.5625 MHz at location 1 "MTN TRAIL," and frequency pair 478/481.7125 MHz at location 2, "LAKESIDE DRIVE."

¹¹ See FCC File No. 0002644841.

¹² See *supra* note 3.

¹³ See Section 90.307(d) Waiver Letter at 1; Section 90.311(a)(2) Waiver Letter at 1.

¹⁴ 47 C.F.R. § 1.925(b)(3)(i).

¹⁵ 47 C.F.R. § 1.925(b)(3)(ii).

¹⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (*citing Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corporation, Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 ¶ 6 (2003).

¹⁷ 47 C.F.R. § 90.307(d).

¹⁸ See County of York, Pennsylvania, *Order*, 19 FCC Rcd 24425, 24427 ¶ 7 (WTB PSCID 2004) (*York County Order*).

receive the requisite 0 dB protection from Vernon's proposed adjacent channel operations.¹⁹ Second, we note that Vernon has obtained a letter of concurrence from station WNEP-TV with respect to Vernon's proposed operations.²⁰ We also believe that conditionally granting Vernon's request for a waiver of Section 90.307(d) would be consistent with our prior decision to grant Vernon a waiver of the rule with respect to the initial frequencies authorized to Vernon under call sign WQBZ928.²¹ In this regard, we note that the proposed system would not only operate in the same TV channel 15 band, but also would share the same location as Vernon's currently authorized base stations.

6. In order to obtain a waiver of the base station mileage separation requirement, however, the Commission requires that the associated mobile and control stations not operate within 60 miles of an adjacent TV station.²² Because Vernon's proposed mobiles would operate with a radius of 26 kilometers (16.16 miles),²³ or as close as 86.79 kilometers (53.94 miles) of station WNEP-TV, we therefore believe that a condition to the grant of Vernon's request for a waiver of Section 90.307(d) is warranted to protect WNEP-TV from potential mobile interference. Accordingly, we will require Vernon to take the necessary steps to prevent its mobile units from operating within 60 miles of station WNEP-TV. Additionally, when requesting modification of its operation in any fashion that could increase the possibility of interference, Vernon must demonstrate that its modification application has been served on station WNEP-TV.²⁴ We conclude that granting a waiver of the rule as conditioned herein will not undermine the purpose of Section 90.307(d) because it will protect receivers within the protected contour of station WNEP-TV from harmful interference.²⁵ Further, we believe that granting Vernon a waiver of Section 90.307(d), as conditioned, is in the public interest because it would afford Vernon's public safety community access to additional radio spectrum, thereby enhancing its ability to protect both lives and property consistent with the Communications Act.²⁶

7. Next, we turn to Vernon's request for waiver of Section 90.311(a)(2) of the Commission's rules, which states that once a 470-512 MHz band frequency is assigned, subsequent authorizations will be granted within the same urbanized area only to users from the same category.²⁷ Here, Vernon requests frequency pair 478/481.9625 MHz, which has been assigned at other locations in the New York/Northeastern New Jersey area to Consolidated Edison Company of New York, Inc. (Consolidated Edison), call signs KX2708 and KZD712, New York, New York.²⁸ Consolidated Edison is an I/B category licensee, and, therefore, frequency pair 478/481.9625 MHz is available for licensing in the New York/Northeast New Jersey urbanized area only to other I/B eligibles.²⁹ Vernon seeks a waiver

¹⁹ See FCC File No. 0002644841, attached Propagation Study; see also Private Land Mobile Operations in the 470-512 MHz band, *Public Notice* No. 20291 (rel. Oct. 22, 1991) at 1 (*Public Notice* No. 20291) (stating that any request for waiver of the applicable mileage separations must demonstrate that affected adjacent channel TV stations would receive 0 dB protection at their Grade B contours).

²⁰ See File No. 0002644841, attached letter from Mike Morkavage, Chief Engineer, WNEP-TV, to Eric Pfunke, Mountain Radio and Electronics L.L.C. (dated June 5, 2006).

²¹ See *supra* note 11.

²² See *Public Notice* No. 20291 at 1.

²³ See FCC File No. 0002644841.

²⁴ See *York County Order*, 19 FCC Rcd 24428 ¶ 7. See also *Public Notice* No. 20291 at 1.

²⁵ *Id.*

²⁶ 47 U.S.C. § 151. Section 1 of the Communications Act, as amended, defines one of the Commission's over-arching purposes as "promoting safety of life and property through the use of ... radio communication." *Id.*

²⁷ See 47 C.F.R. § 90.311(a)(2).

²⁸ See licenses for Stations KX2708 and KZD712.

²⁹ See 47 C.F.R. § 90.311(a)(2).

of Section 90.311(a)(2) because Vernon is eligible in the Public Safety category, but not in the I/B category.

8. The underlying purpose of Section 90.311(a)(2) is to maintain frequency separation between different categories of radio systems, such as public safety and I/B, in the same urbanized area, and to ensure that entities sharing channels are engaged in compatible operations, so as to limit the possibility of co-channel interference.³⁰ Here, Vernon has not addressed how the underlying purpose of Section 90.311(a)(2) would be frustrated by application to the instant case. Additionally, Consolidated Edison has made no indication that it would vacate frequency pair 478/481.9625 MHz, which would render the frequency pair available in the General Access Pool.³¹ We therefore find no reason to grant Vernon's request for waiver under the first prong of the Commission's waiver standard. We also are not persuaded that Vernon has established the burden required to warrant a waiver under the second prong of the waiver standard. That is, Vernon has not shown that in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or that Vernon has no reasonable alternative. Simply echoing IMSA's determination that Vernon has no reasonable alternative and stating that no spectrum is available,³² without pleading with particularity the facts and circumstances, does not constitute the requisite showing. Although Vernon's proposed operations are located in a geographic area of generally high frequency congestion, we do not find this fact to be a unique circumstance.³³ Accordingly, we deny Vernon's request for waiver of Section 90.311(a)(2) for frequency pair 478/481.9625 MHz.

9. Finally, we note that Vernon requests operations on frequency pair 476/479.3250 MHz at a site short-spaced (56.4 kilometers) with co-channel Public Safety Pool station WPMR992, Borough of Madison, New Jersey (Madison), which is fully loaded with 75 mobile units.³⁴ Under these circumstances, Vernon's proposed operations would violate Section 90.313(c), which provides that a frequency pair in the 470-512 MHz band may be reassigned within 64 kilometers (40 miles) of base stations authorized on the frequency pair until the pair reaches the maximum loading of mobile units.³⁵ Aside from the exclusive use case, Section 90.313(b) of the Commission's rules permits the loading limit to be exceeded upon submission of a signed statement by all those sharing the channel agreeing to the increase.³⁶ While Vernon acknowledges that it has a co-channel short-spacing issue with station WPMR992, it neither has submitted a sharing statement signed by Madison nor requested a waiver of Section 90.313(c).³⁷ Therefore, in the absence of a signed sharing statement, and the lack of record to

³⁰ See *City of El Segundo, Order*, 20 FCC Rcd 10105, 10107 ¶ 7 (WTB PSCID 2005), *aff'd*, *Order on Reconsideration*, 20 FCC Rcd 18857 (WTB PSCID 2005).

³¹ See 47 C.F.R. § 90.311(a)(2).

³² See Section 90.311(a)(2) Waiver at 1.

³³ See *Shell Chemical Co., Order*, 17 FCC Rcd 3488, 3492 ¶ 9 (WTB PSPWD 2002) (stating that "although there is often a shortage of spectrum in certain areas of the country, such a shortage is not a unique or unusual circumstance that, standing alone, would justify grant of a waiver") (citing *License Communications Services, Inc., Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23791 ¶ 21 (1998)).

³⁴ See license for Station WPMR992. The maximum loading for a system eligible in the Public Safety Pool is 50 units. See 47 C.F.R. § 90.313(a)(1). Madison is allowed to exceed this number because it has exclusive use of the frequency pair. See 47 C.F.R. § 90.313(b).

³⁵ 47 C.F.R. § 90.313(c). This rule sets forth the showing that must be made by an applicant in order for its request for additional spectrum to be considered. See *License Communications Services, Inc. et al., Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23792 ¶ 23 (1998).

³⁶ 47 C.F.R. § 90.313(b).

³⁷ Vernon sought, but has not received, a "letter of concurrence" from Madison. See FCC File No. 0002644841, attached letter from Don Teolis, Township Manager, Township of Vernon, to Captain Vincent D. Chirico, Borough (continued....)

support a waiver of Section 90.313(c) on our own motion, we deny Vernon's request to use frequency pair 476/479.3250 MHz.

IV. CONCLUSION

10. Because we find that Vernon has demonstrated that a waiver of Section 90.307(d) is warranted, we conditionally grant its request to waive this rule so that it may operate on frequency pairs 477/480.0375 and 477/480.0625 MHz. However, we find that Vernon has not met the criteria to obtain a waiver of Section 90.311(a)(2) and, accordingly, we deny the request for waiver of this rule with respect to frequency pair 478/481.9625 MHz. Finally, we deny Vernon's request to operate on frequency pair 476/479.3250 MHz because it has neither submitted a signed sharing statement nor sought or supported a waiver of Section 90.313(c). Therefore, we grant Vernon's application, in part, and deny it, in part.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the Request for Waiver of Section 90.307(d) of the Commission's rules, 47 C.F.R. § 90.307(d), filed by the Township of Vernon, New Jersey on June 9, 2006, IS GRANTED SUBJECT TO THE CONDITIONS SPECIFIED HEREIN.

12. IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the Request for Waiver of Section 90.311(a)(2) of the Commission's rules, 47 C.F.R. § 90.311(a)(2), filed by the Township of Vernon, New Jersey on June 9, 2006, IS DENIED.

13. IT IS FURTHER ORDERED that application FCC File No. 0002644841, as amended, SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

14. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Dana Shaffer
Chief, Policy Division
Public Safety and Homeland Security Bureau

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of Madison, dated Feb. 1, 2006. Madison replied, requesting more information. See FCC File No. 0002644841, attached letter from Sgt. D.J. Brightly, Borough of Madison, to Don Teolis, Township Manager, Township of Vernon, dated Feb. 6, 2006. Vernon responded with a brief, technical report, which predicts no interference problems. See FCC File No. 0002644841, attached letter from Gary G. Gardner, Assistant Township Manager, Township of Vernon, to Sgt. D.J. Brightly, Borough of Madison, dated Feb. 21, 2006.